APPENDIX Vol.I. App. III - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA DATED JULY 20, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IRENE L. STEPHENS	:	
	:	
Plaintiff(s),	:	
	:	CIVIL ACTION NO.
v.	:	
	:	1:02-CV-1608-RWS
GEORGIA DEPARTMENT OF TRANSPORTATION	:	:
	:	
Defendant(s)	:	

ORDER

Plaintiff Irene L. Stephens filed this employment discrimination suit against her former employer, Defendant Georgia Department of Transportation "Defendant" or "GDOT"). Now before the Court for consideration are Defendant's Motion for Summary Judgment [62-1] as to Plaintiff's Title VII claims; Plaintiff's Motion for Summary Judgment [97-1]; Defendant's Motion to Strike Plaintiff's Response and Opposition to Defendant's Motion for Summary Judgment [98-1], or in the alternative, Strike from the Record certain portions of Plaintiff's Response [98-2]; and Plaintiff's Dismissal of Complaint [107-1]. After considering the entire record, enters the following Order.

As an initial matter, Plaintiff has attempted to voluntarily

dismiss the Complaint; however, she has clarified that she wishes to do so without prejudice. For the reasons set forth in the Court's Order entered June 17, 2004, Plaintiff has not met the requirements for obtaining such a dismissal. Accordingly, her Dismissal of Complaint [107-1] which the Court construes as a motion to voluntarily dismiss without prejudice, is hereby **DENIED**.

The detailed procedural history of this case is set forth in the Court's Order entered April 23, 2004 (the "April 23 Order"), and the Court does not describe it again here. In the April 23 Order, the Court granted summary judgment to Defendant on all of Plaintiff's claims except for he Title VII claim..[1] Because of the unusual procedural posture at which certain summary judgment briefs had been filed, the Court allowed the parties to complete additional briefing on the Title VII issues only. The now-pending motions arise from that additional briefing.

I. Motions to Strike

Defendant's ask the Court to Strike Plaintiff's Response and Opposition to their Motion for Summary Judgment and Plaintiff's Cross-motion for Summary Judgment [97-1], or in the alternative, to strike certain portion of that document. Although the Court declines to strike the entire document, it finds that striking certain portions of it is warranted here.

1.In the April 23 Order, the Court stated that Defendant is entitled to Eleventh Amendment immunity from claims arising under Title II of the ADA. Since that time, the Supreme Court has held that Congress validly abrogated sovereign immunity with respect to such claims involving due process rights-in particular, the right of access to the courts. **Tennessee v. Lane**, - U.S.-, 124 S. Ct. 1978, -L.Ed. 2d (2004). Nevertheless, Title II is not applicable here because it deals with access to public services, programs, and activities, not employment like Title I. **Id**. at 1984.

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Federal Rule of Civil procedure 12(f) provides that the "court may order stricken from any pleasing . . . any redundant, immaterial, impertinent, or scandalous matter." "Scandalous matter" may be that which reflects cruelly upon a party's moral character, uses repulsive language, or detracts from the dignity of th . court. Carone v. Whalen, 121 F.R.D. 231, 233 (M.D.Pa. 1988). Moreover, although a court must liberally construe pro se pleadings, a party's pro se status does not entitle her to file abusive documents. Theriault v. Silber, 579 F.2d 302, 303 (5th Cir. 1978).[2]

Defendants point to several portions of Plaintiff's Response which they contend are scandalous. First, Plaintiff makes reference to affiant Velvia Caldwell's bankruptcy filings and states that Ms. Caldwell "totally relished the opportunity to once again, lie, cheat and act dishonestly." (Pl.'s Resp. [.97-1] at 9.)Plaintiff refers to Ms. Caldwell as a "phoney witness " and is very derogatory of her character. The Court concludes that the entire section is vexatious and abusive. It adds nothing to the Court's consideration of summary judgment issues because (1) the Court cannot consider issues of credibility; and (2) even if portions of it might be allowable , it fails to provide evidence in support of the assertions. See generally Anderson v. Liberty Lobby, Inc., 477 U.S. 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (describing standards for considering motion for summary judgment).

Second, footnote 10 of Plaintiff's Response is an attack on Judge Martin, the judge to whom this case was originally

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2. The U.S. Court of Appeals for the Eleventh Circuit adopted as binding precedent the decisions of the U.S. Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

assigned. The footnote states that Judge Martin "intended to throw the case for the Defendant" and "libeled and slandered Plainitff." (Pl.'s Resp. [97-1] at 27 n.10.) This is not the first time Plaintiff has used the pleadings before the undersigned to make such caustic accusations against a member of this Court. The Court agrees with Defendants that this type of statement is the kind contemplated by Rule 12(f). See Theriault, 579 F.2d at 303 ("Our pro se practice is a shield against the technical requirements of a past age; it is not a sword with which to insult a trial judge.").

Finally, Plaintiff 's Respone repeatedly accuses Defense counsel of lying, knowingly submitting perjured affidavits, and committing fraud upon the Court, Plaintiff provides no basis for these serious allegations, which are vexatious, offensive , and only obscure the issues before the Court. See Carone, 121 F.R.D. at 233-34 (striking plaintiff's complaint which, among other things, included attacks on opposing attorney, contending he was a liar and accusing him or perjury).

Based on the foregoing, the Court concludes that Defendant's Motion is due to be granted as to the following portions of Plaintiff's Response:(1) all references and documents relating to bankruptcy filings of Velvia Caldwell; (2) the entire section entitled "the Perjured Affidavit of Velvia Caldwell,"(3) footnote 10; (4) every reference to a perjured affidavit; and (5) every reference to Defendant's counsel as being fraudulent. The Court cautions Plaintiff that it will consider striking such material sua sponte in the future

II. Motions for Summary Judgment

A. Plaintiff's Motion for Summary Judgment

In her Response and Opposition to Defendant's Motion

for Summary Judgment, Plaintiff herself moves for summary judgment. This motion is untimely because it was filed more than 20 days after the close of discovery. N.D.Ga.Local R. 56.1A. Accordingly, it is hereby **DENIED**.

B. Defendant's Motion for Summary Judgment on Title VII Claims

As noted above, the only remaining claims for consideration are Plaintiff's claims for race and gender discrimination under Title VII. The Court concludes that Defendant is entitled to summary judgment on these claims.

Factual Background

Beginning in April 1999, Plaintiff was employed by Defendant as a Transportation Engineer Associate.[3] From September 2000 until Plaintiff's termination, Plaintiff's direct supervisor was Darrel Williams, a Project Engineer at GDOT whom had been with the agency for twenty-six years. During Plaintiff's employment, Steve Henry was the District Engineer for the metro Atlanta region of GDOT. In November 2000, Mr. Henry was alerted that there were concerns about Plaintiff's performance and her behavior on the job. (Henry Aff.¶ 3.)

For Example, on November 7, 2000, Plaintiff was to

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3. The Court gleans the facts from Defendant's attachments to its Motion for Summary Judgment and Reply, Plaintiff's attachments to the Amended Complaint, and Plaintiff's other submissions. Although Plaintiff has submitted an affidavit, it contains self-serving ipse dixit and conclusions of law unsupported by other record evidence and is thus not sufficient to create genuine issues of material fact. See Bennett v. Town of Riverhead, 940 F.Supp. 481, 486 (E.D.N.Y. 1996) ("Conclusory, ipse dixit assertions will not defeat a summary judgment motion.").

complete a file folder for an upcoming project and did not complete this project as requested. (Williams Aff.Arr.A.) On November 8, 2000, Plaintiff left the project site and went to the General Office without Mr. Williams' permission. (Williams Aff. ¶ 6.) The following day, Mr. Williams met with Plaintiff to address these issues; after the meeting, Plaintiff stated that she was sick and had to go home. (Id. ¶ 7.) Plaintiff failed to show for work on November 10 and 11, 2000. (Id. ¶ 8.) Mr. Williams sent Plaintiff a letter of warning for failing to report to work as scheduled. (Id. Att. B.) According to Defendant, Plaintiff frequently used sick leave when she was scheduled for an undesirable temporary shift or assignment.[4]

On November 17, 2000, Plaintiff requested 32 hours of "emergency annual leave." (Am. Compl. ¶ 113; Williams Aff. Att.C.) Plaintiff met with Mr. Williams and two other GDOT employees, who told her that she had twenty-three hours of sick leave available but could supplement that time with nine hours of annual leave. (Id.) However, Plaintiff would need to provide a doctor's excuse according to GDOT's policies. (Id.) Plaintiff replies that she did not want to use sick leave because this was an emergency, and she requested clarification. (Id.) Mr. Williams took her to Mr. Henry; after he instructed her about the leave policy she stated that she needed to be taken to the emergency room. (Id.) Mr. Williams took her to the nearest emergency room. (Id.)

On December 1, 2000, Plaintiff drove her personal vehicle onto a project site, stating that lifting traffic cones out of he GDOT truck was giving her back problems. (Williams Aff. Att. D.) Mr. Williams told Plaintiff that she would need a doctor's excuse if she was unable to lift the cones, and he told her that she would need to pick up her state vehicle from the

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4. Plaintiff alleges that she sought an immediate transfer to the Office of Bridge design on November 13, 2000. (Am. Compl.¶ 102.)

Forest Park Lab because she could not conduct state inspections in her personal vehicle. (Id.) Plaintiff picked up her state vehicle and then radioed Mr. Williams to say that she would need to leave early for a doctor's appointment. (Id.) Mr. Williams conveyed a message to Plaintiff that she should ride back to Forest Park Lab with a co-worker, Cheryl Davis, so that another employee could use her state vehicle for the remainder of the day. (Id.) When Ms. Davis approached Plaintiff, Plaintiff refused to release the vehicle. (Id. Att.E.) In fact, Plaintiff skidded out of the project site and nearly hit Mr. Davis. (Id.) Mr. Williams instructed Ms. Davis to follow Plaintiff. (Id.) Plaintiff drove to Forest park lab; on the way, Ms. Davis observed Plaintiff driving erratically, at excessively slow and fast speeds. (Id.) When they reached Forest Park Lab, Plaintiff turned over the keys to the vehicle. (Id.)

The same day of this incident, Mr. Williams received a doctor's excuse from Plaintiff stating she would be out of work until December 6, 2000. (Williams Aff. Att. F.) No reason was provided. (Id.) As a result of this incident and Plaintiff's perceived misuse of leave, Rachel Brown, the Area Engineer at the time, recommended disciplinary action for Plaintiff. (Brown Aff. ¶ 5.) On December 7, 2000, Ms. Brown, Mr. Henry, and Donald LaFrenier, Administrative Officer of the district at the time, went to Plaintiff's project site to discuss the December 1 incident and attempt to understand Plaintiff's actions. (Brown Aff ¶ 6; Henry Aff ¶ 5; LaFrenier Aff. ¶ 3.) Plaintiff was uncooperative, adversarial, and non-responsive. (Brown Aff ¶ 6; Henry Aff. ¶ 6; LaFrenier Aff. ¶ 3.) As a result, Mr. Henry placed Plaintiff on administrative leave with pay and instructed her to attend a professional evaluation on December 8, 2000. (Henry Aff. ¶ 6.) Mr. Henry explained to Plaintiff that her continued employment was contingent on her attending the evaluation. (Id.) On December 8, 2000, however, Plaintiff refused to attend the evaluation; she faxed a letter to

Bill Dunn at GDOT so stating and requested a statement from Mr. Henry in writing. (Williams Aff. Att. I.) On that same day, Mr. Henry terminated Plaintiff for insubordination effective December 27, 2000. (Henry Aff. ¶ 8.)

Plaintiff filed two internal grievances while employed at GDOT that are of some relevance here. On December 4, 2000, she filed a grievance relating to an incident with Ms. Brown on November 30, 2000. (Am. Compl. Ex. 34.) In this grievance, Plaintiff stated that Ms. Brown maintained unsafe working conditions by, among other things failing to respond to gasoline odors in an office building. (Id.) Plaintiff filed a second internal grievance on December 11, 2000; although Plaintiff alleges that this grievance complained that Defendant had retaliated against her for requesting to be transferred to the Office of Bridge Design, (Am. Compl. ¶ 148), the grievance itself states that Defendant retaliated against her for filing her first grievance. (See Am. Compl. Ex. 39.)

Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") and the Georgia Commission on Equal Opportunity on June 15, 2001.[5] (Am.

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5. It seems possible that some of Plaintiff's claims may time-barred because certain instances of discrimination occurred more than 180 days prior to her filing the charge with the EEOC. See 42 U.S.C. § 2000e-5. On the record before it, however, the Court is unable to determine whether Plaintiff's intake questionnaires, file earlier in 2001, met the requirements set forth in Title VII. See, eg. Shempert v. Harwick Chem. Corp., 151 F.3d 793. 796 (8th Cir. 1998)(intake form must be signed under oath or verified to satisfy statutory requirement for administrative

Compl. Exs. 43, 44.) Plaintiff apparently received a right-to-sue letter prior to filing this case.

Discussion

1. Summary Judgment Standards

Summary judgment is appropriate when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non-movant. Addickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).The party seeking summary judgment must first identify grounds that show the absence of a genuine of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. at 257.

2. Title VII

Title VII makes it unlawful to discriminate against any individual with respect to her employment because of the individual's race, color, religion, sex, or national origin. 42

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charge); cf. Edelman v. Lynchburg College, 535 U.S. 106, 109, 122 S.Ct. 1145, 152 L.Ed. 2d 188 (2002)(technically flawed charge of discrimination can be addressed by later amendment).

U.S.C. § 2000e-(a). This Court outlined the requirements for proving employment discrimination using circumstantial evidence in McDonnell Douglas Corp. V. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Under the McDonnell Douglas analysis, a plaintiff must establish a prima facie case of discrimination. Id. At 802; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed. 207 (1981); see Benson v. Tocco, Inc. 113 F.3d 1203, 1207 (11th Cir. 1997)(plaintiff must produce sufficient evidence to support an inference that the employer based its decision on an illegal criterion to establish prima facie case). Establishing a prima facie case has the same effect as a presumption of unlawful discrimination; the employer cannot be silent but must come forward with evidence of a legitimate nondiscriminatory reason for its decision. 411 U.S. at 802; Chapman v. A.I. Transp., 229 F.3d 1012, 1024 (11th Cir. 2000); Young v. Gen.Foods Corp., 840 F.2d 825, 828 (11th Cir. 1998). This burden is "exceedingly light," as the employer "must merely proffer [non-discriminatory reasons], not prove them." Perryman v. Johnson Prod. Co., 698 F.2d 1138, 1142 (11th Cir. 1983). When a defendant expresses one or more legitimate reasons for the action, the presumption of discrimination evaporates, and a plaintiff must raise a genuine issue of material fact as to whether the reasons offered by the defendant are pretextural. McDonnell Douglas, 411 U.S.at 804; Chapman, 229 F.3d at 1024-25; Brown v. Amer. Honda Motor Co., 939 F.2d 946 (11th Cir. 1991)(requiring plaintiff to come forward with specific evidence demonstrating that the defendant's reasons are a pretext for discrimination after defendant offers sufficiently probative, credible, non-discriminatory reasons for its actions).

Reading the Amended Complaint liberally, it appears that Plaintiff alleges several theories cognizable under a Title VII claim: (1) that she was denied a transfer to the Office of Bridge Design and ultimately terminated because of her sex; (2)

that she was a victim of disparate treatment; and (3) that she was retaliated against because of her sex.[6] As discussed below, Defendant is entitled to summary judgment with respect to all of these theories.

Prior to turning to the merits of the Title VII claims, however, the Court notes that Plaintiff appears to argue that a state administrative law judge's ("ALJ") decision on her entitlement to state unemployment benefits should have a preclusive effect in this case. The ALJ did not consider any of the federal issues present in this case. Moreover, it is well established that unreviewed state administrative rulings do not have preclusive effect over Title VII claims. Bisgop v. City of Birmingham Police Dep't, 361F.3d 607, 610 (11th Cir. 2004); Crapp v. City of Miami Beach, 242 F.3d 1017, 1022 (11th Cir. 2001). The Court now turns to the merits of the Title VII Claims.

a. Denial of transfer and ultimate termination

Defendant contends that Plaintiff cannot establish a prima facie case as a matter of law. The Court agrees. To establish a prima facie case, a plaintiff must show: (1) she is a member of a protected class; (2) she is qualified for the position; (3) she was subjected to adverse employment action; and (4) she was replaced by a person outside the protected

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6. Although Plaintiff alludes to her race and religion as part of her Title VII claim, there are no allegations or evidence in the record to support claims based on Plaintiff's race or religious preferences. Moreover, the affirmative evidence presented by Defendant shows that neither Plaintiff's race nor religion was a casual factor in any of Defendant's conduct. (See, e.g., Brown ¶¶ 12,14 (Plaintiff was treated equally to similarly situated individuals of other races, and affiant was unaware of Plaintiff's religious preferences); Davis Aff. ¶¶ 8,10 (same); Henry Aff. ¶¶11,13 (same); LaFrenier Aff. ¶¶ 5,7 (same); Williams Aff. ¶¶ 20, 22 (same).)

class. Kelliher v. Veneman, 313F.3d 1270, 1275 (11th Cir. 2002); Hinson v. Clinch County Bd. of Educ., 231 F.3d 821, 828 (11th Cir. 2000); Smith v. Ala. Dep't of Corr., 145 F. Supp.2d 1291, 1297 (M.D. Ala. 2001). With the exception of Plaintiff's status as a female, Plaintiff has failed to even allege several of these elements.[7]

i. Denial of transfer

Plaintiff alleges that on November 13, 2000, she requested an immediate transfer to the Office of Bridge Design. (Am. Compl. ¶ 102.) She alleges that "Defendant continued to recruit engineers to work at the Office of Bridge Design . . . when those individuals hired had less experience and abilities than did the Plaintiff." (Id. ¶ 105.) Reading the Amended Complaint wery liberally, it appears that Plaintiff argues that Defendant refused to transfer her because of her sex. (See Am. Compl. Count Two G ("Defendant . . . committed such pertinent acts . . . so as to ensure that the Plaintiff, as a woman, would not be accorded the same status as being accorded to men.").)

This claim cannot succeed for several reasons. First, Plaintiff has not shown evidence that she was qualified for the position she sought on the Office of Bridge Design. She failed to describe that position at all. Second, Plaintiff has not shown evidence how the failure to transfer her amounted to an adverse decision. To meet this requirement, a plaintiff must show that denial of a transfer amounted to "a serious and material change in the terms, conditions, or privileges of employment." Smith, 145 F.Supp. At 1297. Plaintiff must further show that a

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7. Although Plaintiff has provided no allegations or evidence with respect to whether the position was given to someone outside her protected class, Defendant's have provided evidence that the position was filled by a man after Plaintiff's termination. (Liles Aff.[101-1, Ex.A]¶8.)

reasonable person in her position would view the employment action as adverse. Hinson, 231 F.3d at 829; Doe v. DeKalbCounty Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998). Plaintiff has not even alleged facts supporting these elements, and there is not evidence before the Court to meet these standards.

Third, Defendants have presented evidence showing that Plaintiff never actually applied for a transfer to the Office of Bridge Design. (Liles Aff.¶ 6.) Plaintiff expressed interest in the position, but did not follow up with a formal request. (Id.) Plaintiff has shown no evidence creating issues of fact regarding this matter, which is insufficient at the summary judgment stage.

Based on the foregoing, Defendant is entitled to summary judgment on this claim.

ii. Termination

Likewise, Plaintiff cannot survive summary judgment on her termination claim, which entails the same elements as the transfer claim. She has failed to show that she was replaced by a minority or a male or that she was even replaced. She merely contends that at the time of her employment, all twelve GDOT board members wer men. She further states, without providing evidence, that Defendant generally failed to recruit or promote women at top-level management positions. Even if Plaintiff were able to establish a prima facie case of gender discrimination, however, Defendant has come forward with a legitimate, non-discriminatory reason for termination her. She refused to follow her supervisors' directions on several occasions, and took a state vehicle and drove dangerously on public roads, as evidenced by Defendant's affidavits and exhibits. Even after such behavior, Defendant attempted to meet with Plaintiff and attempt to work with her, but she failed

to cooperate. This legitimate, non-discriminatory reason for termination Plaintiff meets Defendant's summary judgment burden. See Kelliher, 313 F.3d at 1277 (evidence of plaintiff's "dereliction of duty and insubordination constituted an adequate non-discriminatory reason" to discharge); Williams v. Motorolla, Inc., 303 F.3d 1284, 1292 (11th Cir. 2002)(record "firmly reflect[ed]" that plaintiff was fired for insubordination and inability to get along with co-workers and superiors, such that judgment was properly entered for defendant employer). There is no evidence in the record that this reason was pretextual, and Defendant is accordingly entitled to summary judgment on this claim. b. Disparate treatment

Nor can Plaintiff survive summary judgment under a disparate treatment theory. To show disparate treatment, a plaintiff must show that she was similarly situated to others but was treated differently in spite of similar misconduct, the same workplace rules, and the dame decision-making supervisor. Knight v. Baptist Hosp., Inc., 330 F.3d 1313, 1315 (11th Cir. 2003); see Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1992)(describing principles).

Plaintiff appears to argue that two individuals were treated differently than she. She alleges that Larry Seabrook, a State maintenance Engineer, was involved in an accident as a result of alcohol but was not required to undergo a fitness evaluation and was not terminated. (Am. Compl. ¶¶ 34-37.) She also alleges that her supervisor, Cheryl Davis, was absent from work for thirty days while she was in jail for drinking and driving and was never disciplined. (Am. Compl. ¶¶ 52-54.)

These allegations are insufficient because Plaintiff has not alleged facts or presented evidence showing that she was similarly situated with Mr. Seabrook or Ms. Davis. Moreover, Defendant has presented evidence showing that Mr. Seabrook was demoted as a result of conduct other than insubordination,

(Henry, Aff. ¶ 9), and Ms. Davis was visiting her ill father during her absence. (Williams Aff. ¶ 18.) These facts distinguish these individuals from plaintiff, and therefore, summary judgment is appropriate. Holifield, 115 F.3d at 1562.

c. Retaliation

Finally, Defendant is entitled to summary judgment with respect to Plaintiff's claims of retaliation under Title VII. To make a prima facie case for retaliation under Title VII. To make a prima facie case for retaliation, a plaintiff must show: (1) she engaged in a statutorily protected activity; (2) her employer took an adverse employment action; and (3) the adverse employment action was causally related to the protected activity. Little v. United Techs., Carrier Transicold Div., 103 F.3d 956,959 (11th Cir. 1997); Smith 145 F. Supp. 2d at 1300.

Plaintiff cannot show that she engaged in a statutorily protected activity."[T]he complaint which allegedly led to the retaliation must have related to conduct protected under Title VII." Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir. 1999). In Brower, for example, the court rejected the plaintiff's Title VII retaliation claim because it was undisputed that the plaintiff had not raised any issues of race, color, religion, sex, or national origin in her informal complaint with an equal opportunity counselor. Id. at 1006. Likewise here, Plaintiff's December 4 grievance was focused on safety issues and did not mention any issues relating to Plaintiff's membership in a protected class. Cf. Shannon v. Bellsouth Telecommunications, Inc., 292 F.3d 712, 716-717 (11th Cir. 2002) (evidence of denial of opportunities immediately following plaintiff's grievance about religious discrimination was sufficient to state Title VII retaliation claim). Because Plaintiff's December 11 grievance came after her termination, of course, it is not causally

connected to Plaintiff's claimed injuries. See Pipkins v. City of Temple Terr., 267 F.3d 1197, 1201 (11th Cor. 2001)(presenting similar reasoning).

Even if Plaintiff could be said to have made some complaint about treatment base on her sex, [8] Defendant has presented evidence showing that its employees knew only that Plaintiff had filed a grievance about unsafe working conditions on December 4, 2000; they did not have any knowledge of Plaintiff filing or voicing a discrimination-based complaint. (Brown Aff.¶ 11; Davis Aff.¶ 7; Henry Aff.¶ 10; LaFrenier Aff. ¶4). Furthermore, Ms. Brown recommended disciplinary action December 2, prior to Plaintiff's filing of her December 4 grievance. (Brown Aff.¶5.) In addition, Defendant has provided evidence of a legitimate, non-discriminatory reason for he termination, as set forth above.[9] Plaintiff has failed to show any evidence that these reasons were pretextual. Thus, Plaintiff's retaliation theory cannot withstand Defendant's motion.

Based on all the foregoing, Defendant's Motion for Summary Judgment is hereby **GRANTED** as to the Title VII claims.

Conclusion

Defendant's Motion for Summary Judgment [62-1] is hereby **GRANTED**; Plaintiff's Motion for Summary Judgment [97-1] is hereby **DENIED**; Defendant's Motion to Strike

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8. The Court finds no record evidence supporting this possibility.

9. To the extent Plaintiff alleges Defendant retaliated against her by failing to provide good references, her behavior on the job also provides a legitimate, non-discriminatory reason for failing to provide good references.

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Plaintiff's Response and Opposition to Defendant's Motion for Summary Judgment [98-1] is hereby **DENIED**, but Defendants' alternative Motion to Strike from the Record certain portions of Plaintiff's Response [98-2] is hereby **GRANTED**; and Plaintiff's Dismissal of Complaint [107-1], which the Court construes as a motion to voluntarily dismiss without prejudice, is hereby **DENIED**.

SO ORDERED, this 20th day of July, 2004

Signed Richard W. Story
RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

APPENDIX Vol. I., App. IV - OPINION OF THE ADMINISTRATIVE HEARING OFFICER DATED JULY 16, 2001

GEORGIA DEPARTMENT OF LABOR
APPEALS TRIBUNAL SUSSEX PLACE, SUITE 150
148 INTERNATIONAL BLVD., NE ATLANTA, GEORGIA 30303

DECISION OF THE ADMINISTRATIVE HEARING OFFICER-
DOCKET 6290A 2001
SSN: xxx-xx-xxxx

FSO 3100
APPELLANT- CLAIMANT

APPEAL FILED 03/26/2001
APPEAL HEARD 07/06/2001
RELEASE DATE 07/16/2001

EMPLOYER:

Dept. of Transportation
c/o SHEAKLEY/Uniservice
PO BOX 724086
ATLANTA GA 31139

MAIL TO:

IRENE L. STEPHENS
6265 TARA BLVD., LOT F-2
JONESBORO GA 30236

CLAIMANT:

IRENE L. STEPHENS
6265 TARA BLVD. LOT F-2
JONESBORO, GA 30236

JACK ROSENBERG, ATTY
100 ALABAMA ST., S.W.
SUITE 150
ATLANTA, GA 30303

APPENDIX Vol. I., App. IV

APPEARANCES: The hearing was conducted in person at the South Metro Career Center wherein the claimant participated and her Attorney, Mr. Jack Rosenberg. The employer was represented by Mr. Donald LaFrenier, District Administrative Officer, Mr. Darrell Williams, Construction Project Engineer and Mr. Rachel Brown, Area Engineer.

O.C.G.A. PROVISIONS and ISSUES INVOLVED:

OCGA Section 34-8-194(2) (A) - Whether the claimant's discharge or suspension was not a result of the claimant's failure to follow rules, orders, instructions, or for a failure to perform the duties for which hired and would be entitled to benefits; or the claimant was discharge or suspended for failure to follow rules, orders, instructions, or failure to perform the duties for which hired and would not be entitled to benefits. TO RE-QUALIFY: The individual must return to work and earn insured wages equal to ten (10) times the weekly benefit amount of the claim and the individual becomes unemployed through no fault on the part of the individual.

OCGA Section 34-8-157(b) - Whether the employer supplied separation information in a timely manner to the notice of the claim filing. The most recent employer is charged for any benefits properly paid and may be charged, even if the determination is later reversed on appeal, if the employer did not submit timely separation information.

FINDINGS OF FACT: The claimant was employed as a transportation engineer associate April 1, 1999 through December 27, 2000

The claimant was discharged by the district engineer for insubordination. The district engineer was not present for

testimony, however, the district administrative officer indicated the claimant refused to go to a meeting on December 1, 2000. She was suspended by the district manager and paid from December 8 though December 27, 2000 then discharged. The area engineer indicated the claimant did not follow a direct order from the district engineer. She needed to see a doctor because of safety issues. Her behavior was erratic.

The project manager/supervisor indicated the claimant did have some doctor's appointments but he did not question her why she was going to the doctor. He took her to the doctor on one occasion. She did fax a doctor's excuse to him to be off several days possibly through December 6 or December 8, 1999.

The claimant indicated she was under doctor's care and was in deep depression. She was recommended to see a psychiatrist. She was on four medications. She was suspended with pay for not reporting to the evaluation. She did send her supervisor a faxed doctor's statement to be off from December 1, through December 8, 2000. She was fired for not showing up for and evaluation on December 8, 2001 that the employer had asked her to go to. She was not given an opportunity to reschedule the appointment.

Timely separation information was provided as requested.

REASONS FOR DECISION: OCGA SECTION 34-8-194(2)(A) provides for a disqualification when an individual is discharged for failure to obey orders, rules, or instruction or for failure to discharge the duties for which employed. Before disqualification is imposed under this Section of the Law, it must be shown that the individual was at fault by deliberate action or conscious neglect which caused the failure to perform satisfactorily. This disqualification shall continue until such

time as the claimant secures subsequent employment and earns insured wages equal to ten (10) times the weekly benefit amount of the claim.

The claimant was discharged for insubordination. The claimant suffers from manic depression and was not able to report to the psychological evaluation the employer and scheduled. The employer has failed to show the claimant intentionally violated the policy. Therefore, the burden of proof has not been carried and a disqualification is not required.

OCGA Section 34-8-157(b) provides that benefits paid shall be charged against the account of the most recent employer. The amount charged shall be the lesser of benefits paid for the period of unemployment or, the amount of wages pain by such employer during the period beginning with the base period of the claim or the maximum benefit amount of the claim.

DECISION: The determination released by the Department March 12, 2001, disqualifying the claimant effective February 11, 2001, is hereby set aside. The claimant shall be entitled to unemployment insurance benefits effective February 11, 2001, under the provisions of OCGA Section 34080194(2). The claimant will be entitled to benefits for all weeks that claimant has met all the reporting and eligibility requirements as provided for under the provision of OCGA 34-8-195(a)(3).

The employer's tax account shall be charged the lesser of benefits paid for the period of unemployment or, the amount of wages paid during the period beginning with the base period of the claim or the maximum benefit amount of the claim, in accordance with OCGA Section 34-8-157(b).

Decision Released: JULY 16, 2001.

Signed Mary A. Smith
Mary A. Smith
Administrative Hearing Officer

Appeal Rights Expire: JULY 31, 2001

If you desire to appeal this decision, notify the office indicated below in writing. Appeal rights expire 15 days after decision is issued. An appeal filed by mail shall be considered filed on the date of the postmark cancellation shown on the envelope, or the actual date of receipt by the department in the absence of a legible postmark. A postage meter date will not be used to determine the date filed. An appeal filed by fax may be submitted to the fax number shown below and would be considered filed on the date received. vrs

GEORGIA DEPARTMENT OF LABOR
148 INTERNATIONAL BLVD., NE
BOARD OF REVIEW
SUSSEX PLACE - SUITE 801
ATLANTA, GEORGIA 30303

FAX 404.657.3500

This is to certify that this decision was mailed on the above RELEASE DAT BY -TR/MH_. THE POSTMARK DATE IS THE RELEASE DATE.

DOL-473A (2/95)

APPENDIX Vol. I., App. V- OPINION OF THE STATE OF GEORGIA, DEPARTMENT OF LABOR, OFFICE OF THE BOARD OF REVIEW, SUITE 801, 148 INTERNATIONAL BOULEVARD N.E., SUSSEX PLACE, ATLANTA, GEORGIA, DATED SEPTEMBER 11, 2001

BOR NO 6290B 2001
SSN: xxx-xx-xxxx

FSO 3100
APPELLANT EMPLOYER
APPEAL FILED 07/31/2001
RELEASE DATE 09/11/2001

EMPLOYER:

Dept. of Transportation
c/o SHEAKLEY/Uniservice
PO BOX 724086
ATLANTA GA 31139

MAIL TO:

ATLANTA LEGAL AID
ATTN Margaret L Kinnear
151 Spring St NW
ATLANTA, GA 30303

ATLANTA LEGAL AID
ATTN: Margaret L. Kinnear
151 Spring St. NW
Atlanta, GA 30303

CLAIMANT:

IRENE L. STEPHENS
6265 TARA BLVD LOT F-2.
JONESBORO, GA 30236

JACK ROSENBERG
100 ALABAMA ST SW
SUITE 150
ATLANTA GA 30303

After notice to the parties, the appeal in the above matter was considered by the Board of Review.

Upon careful consideration of the record evidence and the contentions of the parties, the Board of Review adopts the administrative hearing officer's findings and hereby affirms the decision.

Released at Atlanta, Georgia, SEPTEMBER 11, 2001.

THE BOARD OF REVIEW

Signature of Herbert C. Green
Herbert C. Green, Chairman

Signature of Xernona C. Brady
Xernona C. Brady, Member

Signature of Ruth F. Claiborne
Ruth F. Claiborne, Member

DECISION BECOMES
FINAL: SEPTEMBER 26, 2001

JUDICIAL REVIEW RIGHTS
EXPIRE: OCTOBER 11, 2001

Code Provisions For

APPEAL TO SUPERIOR COURT

Of

BOARD OF REVIEW DECISIONS

34-8-2 PROCEDURE FOR JUDICIAL REVIEW OF FINAL

DECISIONS OF BOARD OF REVIEW

(a) Any decision of the board of review, in the absence of a reconsideration as provided in subsection (d) of Code Section 34-8-192, shall become final 15 days after the date of notification or mailing. Judicial review shall be permitted only after any party claiming to be aggrieved thereby has exhausted his or her administrative remedies as provided by this chapter. The Commissioner shall be deemed to be a party to any judicial action involving any such decision and shall be represented in any such judicial action by the Attorney General.

(b) Within 15 days after the decision of the board of review has become final, any party aggrieved thereby may secure judicial review by filing a petition against the Commissioner in the superior court of the county where the employee was last employed. In the event the individual was last employed in another state, such appeal shall be filed in Fulton County, Georgia. Any other party to the proceeding before the board of review shall be made a respondent. The petition, which need not be verified but which shall state specifically the grounds upon which a review is sought, shall be served upon the Commissioner or upon such person as the Commissioner may designate, and such service shall be deemed completed service on all parties, but there shall be left with the party so served as many copies of the petition as there are respondents. The Commissioner shall mail one such copy to each such respondent. Within 30 days after the service of the petition, the Commissioner shall certify and file with the superior court all documents and papers and a transcript of all testimony taken in the matter, together with the board of review's findings of fact and decision therein. The Commissioner shall not be required to furnish any person with

a copy of the aforementioned documents, papers, or transcripts or the original of these items prior to the Commissioner's filing these items with the court. The Commissioner may also, in his or her discretion, certify to such court questions of law involved in any decision. As a guide for future interpretation of the law, when the Commissioner is aggrieved by any decision of the board of review or deems such decision contrary to the law and no other party enters an appeal therefrom, the Commissioner may, within 20 days after such decision has become final, appeal and certify to the superior court questions of law therein involved. The court shall consider and determine the same and enter a decree accordingly, which shall be subject to further appeal by the Commissioner. In any judicial proceeding under this Code section, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all other civil cases except cases to which the state is a material party and cases arising under Chapter 9 of this title.

An appeal may be taken from the decision of the superior court to the Court of Appeals in the same manner as is provided in civil cases but not inconsistent with this chapter. No bond shall be required for entering an appeal.

Supreme Court, U.S.
FILED
JAN 3 1 2006
OFFICE OF THE CLERK

NO. 05-637

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

IRENE L. STEPHENS,

Petitioner,

vs.

GEORGIA DEPARTMENT OF TRANSPORTATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING OF DENIAL OF PETITION
FOR A WRIT OF CERTIORARI

Irene L. Stephens
1409 Back Cove Road
Virginia Beach, VA 23454
(757) 332-0636

QUESTIONS PRESENTED

1. WHETHER TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12131 ET SEQ., IS A PROPER EXERCISE OF CONGRESS'S POWER UNDER SECTIONS 1 AND/OR 5 OF THE FOURTEENTH AMENDMENT, AS APPLIED TO THE ADMINISTRATION OF THE DEPARTMENT OF TRANSPORTATION.

2. WHETHER, AND TO WHAT EXTENT, TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12131 ET SEQ., VALIDLY ABROGATES STATE SOVEREIGN IMMUNITY FOR SUITS BY STATE EMPLOYEES WITH DISABILITIES CHALLENGING DISCRIMINATION BY THE DEPARTMENT OF TRANSPORTATION.

3. WHETHER THE OFFICE OF THE CLERK OF THE SUPREME COURT OF THE UNITED STATES CIRCUMSCRIBED THE PETITIONER'S PRESENTATION OF EVIDENCE TO THE HONORABLE COURT BY REJECTING PETITIONER'S MOTION FOR CASE TO BE CONTINUED PENDING THE

COURTS DECISION OF MARSHALL V. MARSHALL, NO. 04-1544 NOTWITHSTANDING THE RECENT PROCEEDINGS AT THIS COURT IN THE CASES OF RIDEOUT v UNITED STATES, UNITED STATES v. FANFAN, UNITED STATES v.BOOKER, AND UNITED STATES v. PENARANDA TO THE DETRIMENT OF THE PETITIONER'S CASE.

4. WHETHER THE DISTRICT COURT FAILED TO ADJUDICATE THE PETITIONER'S CASE AND CLAIMS PROPERLY.

5. WHETHER THE DISTRICT COURT WAS REQUIRED TO HONOR THE JUDICIAL DETERMINATIONS AS MADE AND RENDERED BY THE GEORGIA DEPARTMENT OF LABOR AGAINST THE RESPONDENT IN THE PETITIONER'S FAVOR.

6. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS SHOULD HAVE REVERSED THE JUDGMENT OF THE DISTRICT COURT.

7. WHETHER, UNDER THE CIRCUMSTANCE, EVIDENCE AND FACTS OF THE CASE, WOULD O.C.G.A. § 34-8-223(a) AND/OR

O.C.G.A. § 34-8-223(b) PROVIDE AN EXCEPTION TO TITLE 28 U.S.C. § 1738.

8. WHETHER OR NOT UNDER THE CIRCUMSTANCES, EVIDENCE AND FACTS OF THIS CASE DOES CONFIDENTIALITY EXIST AT THE TIME AN EMPLOYER SCHEDULES AN APPOINTMENT WITH A LICENSED HEALTH CARE PROVIDER, AND THE PROVIDER AGREES TO ACCEPT PAYMENT FOR THE SERVICES TO BE RENDERED TO THE EMPLOYEE UNDER AND PURSUANT TO THE EMPLOYEES HEALTH INSURANCE COVERAGE.

9. DID THE GEORGIA ATTORNEY GENERAL AND THE OFFICE OF THE ATTORNEY GENERAL EXCEED THE LIMIT OF THE POLICE POWERS OF THE STATE CONFERRED UPON THE STATE BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND O.C.G.A. § 34-8-2 OR THE CONSTITUTION OF THE STATE OF GEORGIA

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CERTIFICATION OF COMPLIANCE WITH RULE 44

Petitioner, Irene L. Stephens, hereby certifies that this Motion is limited to intervening circumstances of substantial or controlling effect and otherwise is in compliance with Rule 44, and is presented in good faith and not for delay.

Irene L. Stephens

Irene L. Stephens
1409 Back Cove Road
Virginia Beach, VA 23454
(757) 332.0636

CERTIFICATION OF SERVICE AND VERIFICATION

Pursuant to Supreme Court Rules 29 and 33.1 and Title 28, U.S.C. Section 1746, I hereby state that I have this day served three (3) copies of PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI, at the time of filing, upon G.Melton Mobley, Jr, Lokey, Mobley & Doyle, L.L.C., 8425 Dunwoody Place, Atlanta, GA 30350, by placing a copy of the same into an envelope with no less than first-class postage prepaid to ensure delivery and placing the same into the United States Postal Service on this 15th day of FEBRUARY, 2006.

Irene L. Stephens
Affiant

Irene L. Stephens
1409 Back Cove Road
Virginia Beach, VA 23454

CERTIFICATION OF SERVICE AND VERIFICATION

Pursuant to Supreme Court Rule 14.1(e)(v) and Title 28, U.S.C. Section 1746, I hereby state that I have this day served one (1) copy of PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI, at the time of filing, upon Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001, by placing a copy of the same into an envelope with no less than first-class postage prepaid to ensure delivery and placing the same into the United States Postal Service on this 15th day of FEBRUARY, 2006.

Irene L. Stephens
Affiant

Irene L. Stephens
1409 Back Cove Road
Virginia Beach, VA 23454

RELEVANT PROCEEDINGS

The judgment of the Eleventh Circuit Court of Appeals in Atlanta, Georgia was entered on May 31, 2005. Petitioner sought a timely rehearing of the decision by the panel and sought an en banc determination which was denied on August 17, 2005.

Petitioner filed Petition for Writ of Certiorari on November 14, 2005 and was placed on the docket November 18, 2005 as No. 05-637. The due date for a brief in opposition was December 19, 2005. On December 14, 2005 the Respondents counsel filed a waiver with the court intending not to file a response on behalf of the Respondent, at least three days early. On December 27, 2005, the Office of the Clerk of the Supreme Court of the United States received Petitioner's motion for case to be continued pending the courts decision of Marshall v. Marshall, No. 04-1544. On December 29, 2005, the Chief Deputy Clerk of the court

returned the same to the petitioner. On January 3, 2006, the Petitioner received the December 29, 2005 letter from the Chief Deputy Clerk This case was scheduled for conference on January 6, 2006 and on or about January 9, 2006 the Court denied the Petitioner's petition for a writ of certiorari.

STATEMENT OF THE REASONS FOR GRANTING REHEARING OF THE DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

After denying the Petitioner's petition for certiorari the Honorable Court on January 10, 2006 decided the cases of United States v. Georgia and Goodman v. Georgia, 546 U.S. ____ (2006)((U.S. March 9, 2005)(No. 04-1203)(Goodman March 9, 2005)(No. 04-1236). These substantial developments all occurred after this Court denied the petition for a writ of certiorari. The Petitioner's case had received the same consideration, i.e. one more day to consider the petitioners petition for certiorari by this Honorable Court in this case, as the cases of United States v.

Georgia and Goodman v. Georgia, the Petitioner's petition for certiorari would have been denied after the Honorable court entered judgment in U.S. v. Georgia and Goodman v. Georgia, 546 U.S. _____(2006) on January 10, 2006. See App. C., p. 17a-18a..

The United States District Court for the Northern District of Georgia stated in its April 21, 2004 order:

> " 1. Soverign Immunity
>
> Plaintiff sues on the Georgia Department of transportation. States and their agencies enjoy sovereign immunity pursuant to the Eleventh Amendment to the United States Constitution absent a waiver by the State or valid congressional abrogation. Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89, 99 1000, 104 S.Ct. 900, 79 L. Ed. 2d 67 (1984). As an arm of the state, Defendant is entitled to the same sovereign immunity of the state itself. Robinson v. Ga. Dep't of Transp., 966 F.2d 637, 640 (11th Cir. 1992).
>
> Congress did not abrogate Eleventh Amendment immunity for claims brought under § 1983, Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 2d 358 (1979); the